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In The

# Supreme Court of the United States

THE GOOD NEWS CLUB, ANDREA FOURNIER, AND DARLEEN FOURNIER,

*Petitioners,*

v.

MILFORD CENTRAL SCHOOL,

*Respondent.*

**On Writ Of Certiorari To The United States Court Of Appeals - For The Second Circuit**

## BRIEF OF *AMICI CURIAE* ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; AND NATIONAL COUNCIL OF JEWISH WOMEN, IN SUPPORT OF RESPONDENT

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## INTEREST OF *AMICI CURIAE*[1]

The Anti-Defamation League ("ADL") was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. ADL has always adhered to the principle that these goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion. To that end, ADL has filed *amicus curiae* briefs in many cases before this Court. ADL is able to bring to the issues raised in this case the perspective of a national organization dedicated to safeguarding all persons' religious freedoms.

Hadassah, the Women's Zionist Organization of America, Inc. ("Hadassah"), is the largest women's and the largest Jewish membership organization in the United States with over 300,000 members nationwide. Founded in 1912, Hadassah is known for funding and maintaining health care institutions in Israel and has a proud history of protecting the rights of the Jewish community in the United States. Hadassah has long been committed to the principle of strict separation between church and state that has served as a guarantee for religious freedom and diversity. In an effort to uphold this fundamental principle, Hadassah has participated as *amicus curiae* in many cases before this Court.

The National Coalition for Public Education and Religious Liberty ("National PEARL") is a diverse coalition of grassroots and national religious, educational and civic organizations that seeks to preserve religious freedom and the separation of church and state in public education. National PEARL has participated in an *amicus* capacity in many cases before this Court.

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[1] No counsel for any party authored this brief in whole or in part. No person or entity, other than *amici curiae*, their members or their counsel made a monetary contribution to the preparation and submission of this brief.

The National Council of Jewish Women, Inc. ("NCJW") is a volunteer organization, inspired by Jewish values, that works to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the NCJW has long adhered to the view that religious liberty and separation of church and state are constitutional principles that must be protected and preserved in our democratic society. The NCJW has 90,000 members in over 500 communities nationwide.

## SUMMARY OF ARGUMENT

1. This Court has long recognized "[t]he importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979); *see Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Petitioners question whether a public elementary school may open itself as a forum to certain specified types of speech and still exclude from that limited forum religious worship, instruction and indoctrination targeted at the school's children.[2] *Amici* support respondent's categorical exclusion of that speech as both a reasonable, viewpoint-neutral limitation, consistent with the Free Speech Clause of the First Amendment, and as a limitation mandated by the Establishment Clause of the First Amendment.

2. a. Respondent's policy is a reasonable limitation on use of a public school. Just as the government may

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[2] Although respondent's policy provides broadly that school premises may not be used by any organization for "religious purposes," school officials have interpreted the policy to exclude only religious worship, instruction and indoctrination. *See* J.A. at N4 ("I would interpret [the policy to exclude] conducting religious services, providing religious instruction or to an extreme, religious indoctrination into a philosophy or a belief.").



exclude potentially divisive political speech from the workplace to avoid controversy and the appearance of political favoritism, a public school may choose to open itself only to those categories of speech that will further the interests of the community and the school and to exclude those categories of speech – whether religious, political, commercial or other – that may divide the community. While the public school is designed to promote cohesion among a heterogeneous democratic people, the Good News Club is designed to do quite the opposite: to label people as "saved" or "unsaved" and, thus, to promote religious belief in general and Christian belief in particular.

b. In addition to being reasonable, respondent's policy is viewpoint neutral because it excludes an entire category of speech – namely, religion as it is expressed through religious worship, instruction and indoctrination – from a limited public forum. The Good News Club's speech in its evangelizing meetings is distinct from the kinds of speech permitted under the school's policy. The Club's meetings are overt religious exercises, equivalent in all but name and locale to conventional children's services at churches and synagogues across the country. The distinction between religion as supplying an editorial viewpoint and religious worship, instruction and indoctrination as a subject matter is well recognized in both case law and federal statutory law. While excluding this subject matter may in some instances also exclude a point of view, this Court's precedents are clear that the First Amendment is violated only if speech is excluded from the limited public forum *solely* to suppress the point of view.

3. The Establishment Clause stands as an independent bar to the Good News Club's proposed after-school program for elementary school students because it prohibits the public school from *appearing* to take a position on questions of religious belief. Here, in light of (1) the young age and cognitive limitations of the Good News Club's target audience; (2) the Club's proposed use of a

classroom setting immediately after school, very likely side by side with school-sponsored programs that extend the day for so many of the nation's elementary school students; and (3) the nature of the elementary school forum and the relatively small number of other private groups meeting there, it would have appeared to a reasonable observer that the public school was "sponsoring" or "endorsing" the Good News Club's meetings.

4. To affirm the Court of Appeals' judgment, this Court need only agree with – and address – one of these two propositions, either that the Free Speech Clause permits respondent's limitation on outside use of the school or that the Establishment Clause mandates the limitation. On the other hand, to reject both, and thereby reverse the Court of Appeals' judgment, would undermine the ability of a public school to determine for itself what subjects are appropriate for inclusion in the educational forum and would weaken the well-recognized distinction, central to the concept of public education, between secular learning on the one hand and religious worship, instruction and indoctrination on the other. Petitioners' constitutional views, if adopted by the Court, would thus constitute an unprecedented erosion of Establishment Clause values that – because of the age of the students involved here and the role of public schools in imparting democratic values to young students – would reverberate well beyond this particular case. A new generation of children would grow to maturity associating public schools with religious worship and religious learning. This should not be a price that public schools, or the children they educate, must pay for simply accommodating secular groups like the Girl Scouts and the 4-H Club.

## ARGUMENT

### I. RESPONDENT DID NOT VIOLATE PETITIONERS' FREE SPEECH RIGHTS

It is well established that "[t]he necessities of confining a forum to the limited and legitimate purposes for



which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Where the State has reserved a forum for discussion of only certain topics – as even petitioners acknowledge is the case here, *see* Pet. Br. 15-17; *see also* Pet. App. C12 (District Court opinion) – a restriction on speech is permissible so long as it is "reasonable in light of the purpose served by the forum" and viewpoint neutral. *Rosenberger*, 515 U.S. at 829 (internal quotation marks omitted); *accord Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93 (1993); *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

#### A. Respondent's Policy Is Reasonable

Respondent's exclusion of religious worship, instruction and indoctrination,[3] both in general and as applied to the Good News Club specifically, is plainly reasonable. In *Cornelius*, this Court held that a federal policy excluding legal defense and political advocacy organizations from participating in a charity drive aimed at federal employees was reasonable in light of the forum's purpose and the surrounding circumstances. *See* 473 U.S. at 808-10. Observing that a government's decision to restrict access to a limited public forum need only be *reasonable* – not "the most reasonable or the only reasonable limitation," *id.* at 808 – the Court ruled that "avoiding the appearance of political favoritism" and "avoiding controversy" were reasonable bases to exclude such organizations from participation in the drive, *id.* at 809. As the Court concluded, "The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a [limited public] forum and hinder its effectiveness for its intended purpose." *Id.* at 811.

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[3] *See supra* note 2.

Excluding religious worship, instruction and indoctrination from public school premises similarly avoids unwarranted controversy and the appearance of favoritism. Just as the government may exclude categories of speech so as to " 'insure[ ] peace' in the federal workplace," *id.* at 810, a public school is surely entitled to open itself only to those categories of speech that will further the interests of the school and the community in cohesiveness and to exclude those categories of speech – whether religious, political, commercial or other – that may divide that community. *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 52 (1983) ("[E]xclusion of the rival union may reasonably be considered a means of insuring labor-peace within the schools."); *see also Cornelius*, 473 U.S. at 810 ("[T]he Government need *not* wait until havoc is wreaked to restrict access to a [limited public] forum." (emphasis added)).

That this case involves a forum created by, and identified with, a public school makes the policy of excluding religious worship, instruction and indoctrination all the more reasonable. First, state and local school boards are "afforded considerable discretion" in the operation of public schools. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). Second, religion is a particularly divisive matter in the public school context. In the oft-quoted words of Justice Frankfurter, "[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. *In no activity of the State is it more vital to keep out divisive forces than in its schools . . . .* " *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (opinion of Frankfurter, J.) (emphasis added); *see id.* at 216-17 ("[T]he public school must keep scrupulously free from entanglement in the strife of sects."). "[J]ust as religion throughout history has provided spiritual comfort, guidance, and inspiration to many, it can also serve powerfully to divide societies and to exclude those whose beliefs are not in accord with particular religions or sects . . . . " *School Dist. of Grand*



*Rapids v. Ball*, 473 U.S. 373, 382 (1985), *overruled in part on other grounds by Agostini v. Felton*, 521 U.S. 203 (1997).[4]

Respondent had good reason to believe that the Good News Club's activities in particular would be contrary to the mission of a public elementary school, and therefore would "disrupt [the] forum and hinder its effectiveness." *Cornelius*, 473 U.S. at 811. The core purpose of the Good News Club is to persuade impressionable elementary school children – that is, "children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice," *Ball*, 473 U.S. at 390 – to follow "the Word of God" and to accept Jesus Christ as their "personal Savior." *E.g.*, Lodging at BB4 ("How to Lead a Child to Christ").[5] To this end, the Good News Club teaches that some children are "saved" (those who accept Jesus Christ as their Savior) and others "unsaved" (those who do not); and that some children – the "saved" – are going to go to Heaven while the rest are not. *See, e.g.*, J.A. at P25, P64-65; Lodging at S12, S17, BB5, BB8, BB10.

Thus, for example, the Good News Club's teacher "challenges" the "saved" children to "[s]*top* and *ask* God

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[4] There is a particular risk of appearance of favoritism if only members of a locally dominant faith have the numbers and resources to maintain an after-school religion club. If there were only one or two Jewish, Hindu, or Buddhist children in a school, they could not realistically join clubs analogous to the Good News Club. These children would feel isolated from their classmates – and feel less welcome on school property – solely because of their religions.

[5] The Good News Club is one of the "primary ministries" of the Child Evangelism Fellowship, Inc. That organization's statement of interest in its *amicus curiae* brief here, at App. 1, makes clear that its "whole purpose is to evangelize boys and girls with the Gospel of the Lord Jesus Christ and to establish (discipline) them in the local church for Christian living." *See also* Lodging at DD1 (advocating "Helping You Evangelize Children").

for the strength and the 'want' . . . to obey Him" and "invites" the "unsaved" children "to trust the Lord Jesus to be your Savior from sin" and to "receive Him as your Savior." Lodging at BB18, BB24; *see also* J.A. at P64-65, P67-68, P70-71, P75. Club materials teach young and impressionable children that while believers in Jesus Christ "will also be raised [to Heaven], . . . [i]f a person does not receive the Lord Jesus as Saviour, he will not be able to go to Heaven." Lodging at S12, S17. And during meetings, the children pray to "receive Jesus as their personal Savior"; listen to "missionary stories" that "spread[ ] the gospel" and encourage acceptance of Jesus Christ as the Savior; and sing songs with references to God and Jesus Christ. *E.g.*, J.A. at P16-17, P22-23, P25, P28, P66-67, P109; Lodging at BB11, BB47.

In short, while the public school is "[d]esigned to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people," *McCollum*, 333 U.S. at 216 (opinion of Frankfurter, J.), the Good News Club is designed to do quite the opposite: to label children as either "saved" or "unsaved" and, thus, to promote religious belief in general and Christian belief in particular. Indeed, the Good News Club expressly teaches that adherence to a *particular* faith is essential to one's standing in the community – that those who "have received the Lord Jesus as [their] Savior from sin . . . belong to God's special group – His family." Lodging at S6. Thus, whether or not the Good News Club is nominally open to anyone, *see* J.A. at C2, and whether or not the Club teaches or promotes "any particular *Christian* sect's doctrine or theology," *id.* (emphasis added), respondent's officials were well justified in believing that the Good News Club's meetings would be inconsistent with the purpose of the public school forum. Respondent's limitation on the use of its school building was



reasonable, and so long as that limitation was also viewpoint neutral, the Constitution requires no more.[6]

### B. Respondent's Policy Is Viewpoint Neutral

In addition to being reasonable, respondent's policy is viewpoint neutral because it excludes a distinct category of speech from a limited public forum. An exclusion of speech on the basis of *content* is permissible in a *limited* public forum. *See Lamb's Chapel*, 508 U.S. at 392-93. *Lamb's Chapel* simply does not hold that any and all bans on religious activities in a limited public forum violate the First Amendment. Respondent's limitation on use of its forum *is* an exclusion of content – of an entire subject matter – and not an exclusion solely of particular viewpoints bearing on a secular subject matter. The exclusion is not arbitrary, as shown in the discussion of "reasonableness," above. It is also not discriminatory, as it applies to all speech – that is, to all viewpoints (including differing sectarian viewpoints) – on the excluded subject matter of religion as it is expressed through religious worship, instruction and indoctrination.

Petitioners self-servingly characterize their speech as "instruction of morals from a religious perspective." *E.g.*, Pet. Br. 22. Notwithstanding this effort, however, the record clearly demonstrates that the Good News Club's speech at its meetings is different in kind from the speech permitted under the Milford Central School policy – including, for example, meetings of the Boy Scouts, the

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[6] Respondent's policy is of course animated by some of the considerations underlying the Establishment Clause. *See infra* Part II (arguing that respondent was *required* by the Establishment Clause to exclude the Good News Club's activities from school premises). Nevertheless, for purposes of the reasonableness inquiry, the school need only show that its policy is *reasonable* in light of the forum's purposes, *see Cornelius*, 473 U.S. at 809, without regard to Establishment Clause principles.

Girl Scouts and the 4-H Club. The Good News Club's meetings include vocal group prayers, memorization and recital of Bible verses and Scripture, religious songs and discussions based on Bible readings. *See, e.g.*, J.A. at P16-18, P22-23, P25-26. These are "overt religious exercise[s]." *Lee v. Weisman*, 505 U.S. 577, 588 (1992); *see Wallace v. Jaffree*, 472 U.S. 38, 72 (1985) (O'Connor, J., concurring in the judgment) (calling group vocal prayer and Bible readings "manifestly religious exercise[s]"); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962) (discussing the "religious activity" of prayer). They are equivalent in all but name and locale to conventional church or synagogue services. *Cf. Bronx Household of Faith v. Community Sch. Dist. No. 10*, 127 F.3d 207, 215 (2d Cir. 1997) (describing "church worship services" as "includ[ing] hymn singing, communion, Bible reading, Bible preaching and teaching" (internal quotation marks omitted)).

To the extent the Good News Club's meetings differ from conventional religious services – the meetings involve, for example, prizes, candy and games – this is simply because the Club tailors its evangelizing meetings to its young and impressionable audience. Indeed, the Good News Club's meetings are virtually indistinguishable from children's services commonly held at churches and synagogues across the country, which often involve singing, puzzles, art, stories and prayer.[7]

Nor does it matter that the Good News Club's meetings contain an "instructional" element. First, that element of petitioners' meetings does nothing to change the

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[7] *See, e.g.*, First Union Methodist Church Website (visited January 8, 2001) <http://www.gbgm-umc.org/schenectady/Children%20and%20Worship.htm> (describing "Children and Worship," a "service that is designed for [children] to be age appropriate scripture (story telling) and worship"); Allisonville Christian Church Website (visited January 8, 2001) <http://home.att.net/~allisoncc/children.htm> (describing "Children's Worship: Godly Play," a service for children including singing, story telling, art and food).



essential or overall nature of their speech. Second, the distinction between *religious* instruction and *secular* instruction is not one merely of perspective. To the contrary, religious and secular instruction serve fundamentally different purposes. *See, e.g., School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 223-25 (1963) (distinguishing religious instruction from "nonreligious moral inspiration" and "teaching of secular subjects"); *McCollum*, 333 U.S. at 226 (opinion of Frankfurter, J.) (distinguishing between "secular instruction in subjects concerning religion" and "sectarian teaching"). Religious instruction is designed first and foremost to train adherents of a particular religion in the tenets of that religion's faith and practice. It is not designed, as secular education is, to "prepar[e] . . . individuals for participation as citizens." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

Petitioners' suggestion that no line can be drawn between religion as a viewpoint and religious worship, instruction and indoctrination as a subject matter is without merit. First, although the distinction between content and viewpoint is not always a precise one, *see Rosenberger*, 515 U.S. at 831, there is no reason to believe that officials would not usually be able to draw the requisite distinctions, *see, e.g., Campbell v. St. Tammany's Sch. Bd.*, 206 F.3d 482, 487 (5th Cir. 2000), *reh'g denied*, 231 F.3d 937 (5th Cir. 2000) (per curiam); *Bronx Household*, 127 F.3d at 215. In fact, in the present case – as in *Campbell* and *Bronx Household* – public officials were able to determine from the face of petitioners' application that their proposed use was for an excluded subject matter.

Moreover, the task of distinguishing between "overt religious exercise[s]," *Lee*, 505 U.S. at 588, and other forms of speech is hardly foreign to the law. Indeed, the lines that respondent's officials must draw in implementing their policy are no different from, or more difficult to draw than, the lines that courts and public officials are *required* to draw under current law – for example, between teaching the Bible as a religious text and teaching it as literature, *see, e.g., Edwards*, 482 U.S. at 606-08

(Powell, J., concurring); *Stone v. Graham*, 449 U.S. 39, 42 (1980) (per curiam), or between "religious" Christmas displays and "secular" Christmas displays, *see, e.g.*, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 611-13 (1989); *Lynch v. Donnelly*, 465 U.S. 668, 679-86 (1984). *See generally Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981) (noting that "the Establishment Clause *requires* the State to distinguish between 'religious' speech . . . and 'nonreligious' speech" (emphasis added)). Any number of federal statutes contemplate the same sort of line-drawing without constitutional infirmity.[8]

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[8] *See, e.g.*, 20 U.S.C. § 1011k(c) ("[N]o project assisted with funds under subchapter VII of this chapter . . . shall ever be used for *religious worship* or a *sectarian activity* . . . . "); 20 U.S.C. § 1062(c)(1) ("No grant may be made under this chapter for any educational program, activity, or service related to *sectarian instruction* or *religious worship*, or provided by a school or department of divinity."); 20 U.S.C. § 1066c(c) ("No loan may be made under this part for any educational program, activity or service related to *sectarian instruction* or *religious worship* . . . . "); 20 U.S.C. § 1068e ("The funds appropriated under section 1069f of this title may not be used . . . for . . . any *religious worship* or *sectarian activity* . . . . "); 20 U.S.C. § 1103e ("The funds appropriated under section 1103g of this title may not be used . . . for . . . any *religious worship* or *sectarian activity* . . . . "); 20 U.S.C. § 8897 ("Nothing contained in this chapter shall be construed to authorize the making of any payment under this chapter for *religious worship or instruction.*"); 25 U.S.C. § 1803(b) ("Funds provided pursuant to this subchapter shall not be used in connection with *religious worship* or *sectarian instruction.*"); 25 U.S.C. § 1813(e) ("No construction assisted with funds under this section shall be used for *religious worship* or a *sectarian activity* . . . . "); 25 U.S.C. § 2503(b)(2) ("Funds provided under any grant made under this chapter may not be used in connection with *religious worship* or *sectarian instruction.*"); 25 U.S.C. § 3306(a) ("None of the funds made available under this subchapter may be used . . . for any *religious worship* or *sectarian activity.*"); 29 U.S.C. § 2938(a)(3) ("Participants shall not be employed under this chapter to carry out the construction, operation, or maintenance of any part of any facility that is used or to be used for *sectarian instruction* or as a place for *religious worship* . . . . "); 42 U.S.C. § 604a(j) ("No funds provided directly to institutions or organizations to provide services and administer programs under subsection (a)(1)(A) of this section shall be expended for *sectarian worship, instruction, or proselytization.*"); 42 U.S.C. § 2753(b)(1)(C) (allowing federal grants to be used for student work-study that "does not involve the construction, operation, or maintenance of so much of any facility as is used or is to be used for *sectarian instruction* or as a place for *religious worship*"); 42 U.S.C. § 3027(a)(14)(A)(iv) (requiring a state seeking federal aid for construction of a center for the elderly to promise that "the facility will not be used and is not intended to be used for *sectarian instruction* or as a place for *religious worship*"); 42 U.S.C. § 5001(a)(2) (providing federal grants to support volunteer projects for the elderly, but excluding "projects involving the construction, operation, or maintenance of so much of any facility used or to be used for *sectarian instruction* or as a place for *religious worship*"); 42 U.S.C. § 9807(a)(9) ("[N]o participant will be employed on projects involving . . . the construction, operation, or maintenance of so much of any facility as is used or to be used for *sectarian instruction* or as a place for *religious worship.*"); 42 U.S.C. § 9858k(a) ("No financial assistance provided under this subchapter . . . shall be expended for any sectarian purpose or activity, including *sectarian worship or instruction.*"); 42 U.S.C. § 9920(c) ("No funds provided directly to a religious organization to provide assistance under any program described in subsection (a) shall be expended for *sectarian worship, instruction, or proselytization.*"); 42 U.S.C. § 13791(b)(B)(iv) ("Religious organizations . . . shall not provide any *sectarian instruction* or *sectarian worship* in connection with an activity funded under this subchapter . . . . ") (emphases added to all).



Petitioners seek to blur the line between subject matter and viewpoint by trying to place themselves simultaneously on both sides of it. They propose a seemingly simple truth: religion is *both* the subject matter *and* the viewpoint of their speech. *See* Pet. Br. 22-24. But even accepting this premise, the conclusion does not follow

that respondent's exclusion of their meetings violates the Constitution. This Court has made clear that the Free Speech Clause is violated only if the government excludes speech from a limited public forum "*solely* because [it deals] with [an otherwise includible] subject from a religious standpoint." *Lamb's Chapel*, 508 U.S. at 394 (emphasis added); *accord Cornelius*, 473 U.S. at 806 ("[T]he government violates the First Amendment when it denies access to a speaker *solely* to suppress the point of view he espouses . . . . " (emphasis added)). Thus, where – as here – there is evidence that the government has excluded speech at least in part for a reason "other than . . . that the presentation would have been from a religious perspective," *Lamb's Chapel*, 508 U.S. at 393-94, the mere fact that a religious perspective is also excluded does not give rise to a constitutional violation.[9]

Were the test otherwise, the government's authority to limit the use of a limited public forum to certain subject matters would become meaningless, because private speakers could always evade the limitations by combining speech on an excluded subject matter with a modicum of speech on an otherwise included subject matter. On petitioners' view of the law, for example, a religious group could require a public school to open itself to religious worship merely by including in the religious service a sermon on a secular subject like child rearing. This cannot be the law, for the government would then have lost its ability to "confin[e] a forum to the limited and legitimate purposes for which it was created." *Rosenberger*, 515 U.S. at 829.

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[9] By referring to the Good News Club's speech as having an "additional layer," the Court of Appeals recognized that religion can be both a subject matter and a viewpoint – and that the Constitution is violated only when religion is excluded *solely* on the basis of viewpoint. Pet. App. A15; *see also id.* at A16 ("We conclude . . . that the Good News Club is doing *something other than simply* teaching moral values." (emphasis added)).



Petitioners incorrectly rely on *Rosenberger* to argue that the First Amendment does not distinguish between a religious subject matter and a religious perspective. *See* Pet. Br. 20-21.[10] The speech in *Rosenberger* was a newspaper – what the Court called "a pure forum for the expression of ideas," 515 U.S. at 844 – and its exclusion by the public university from a Student Activities Fund ("SAF") was based on "editorial viewpoint[ ]." *Id.* at 831; *see also id.* at 844 ("[T]he student publication is not a religious institution, at least in the usual sense of that term as used in our case law . . . . "). Here, by contrast, the Good News Club did not seek meeting space for a journalistic venture, but rather meeting space in which to engage in an evangelizing religious activity involving religious worship, instruction and indoctrination. Respondent's limitation on its forum excluded speech that was inherently part of the religious activity, and not an editorial viewpoint in an exchange of ideas.

Nothing in *Rosenberger* precludes the drawing of an intelligible distinction between religion as a viewpoint and religious worship, instruction and indoctrination as a subject matter, and then constitutionally excluding the latter from a limited public forum. To the contrary, the *Rosenberger* Court merely held that the university had not drawn this distinction in excluding the student newspaper from the SAF:

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[10] Reliance on *Widmar* for this point is even more plainly misplaced. *See, e.g., Amicus Curiae* Brief of Douglas Laycock 15-16. *Widmar* held that a state university's prohibition on use of its buildings "for purposes of religious worship or religious teaching" was an impermissible content-based restriction. 454 U.S. at 267-75. The forum in *Widmar*, however, was an open public forum. Accordingly, the Court did not consider a subject-based exclusion of religious worship and teaching in a more limited public forum, and the Court did not conduct a limited public forum analysis.

> [T]he University *does not exclude religion as a subject matter* but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it *also* provides, *as it did here*, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered. The prohibited perspective, *not the general subject matter*, resulted in the refusal [to fund the student newspaper], for the subjects discussed were otherwise within the approved category of publications.

*Id.* at 831 (emphasis added); *see id.* at 832 ("[T]he University justifies its denial of SAF participation to [the student newspaper] on the ground that the contents . . . reveal an avowed religious perspective.").[11] In the present case, however, Milford Central School did not exclude the Good News Club's speech because – let alone "solely because," *Lamb's Chapel*, 508 U.S. at 394 – religion provided its "specific premise," "perspective," or "standpoint"; instead, the school excluded the Good News Club's speech because religious worship, instruction and indoctrination constituted its subject matter.

Finally, petitioners raise the specter of excessive entanglement between church and state, apparently arguing that allowing a school to make the distinction

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[11] In arguing that *Rosenberger* rejected any legal distinction between religion as a subject matter and religion as a viewpoint, petitioners rely heavily on the fact that the dissent in *Rosenberger* characterized the university's guidelines as excluding "the entire subject matter of religious apologetics." 515 U.S. at 896 (Souter, J., dissenting); *see* Pet. Br. 20-21. However, the disagreement between the majority and the dissent in *Rosenberger* was not over whether the government may constitutionally exclude speech from a limited public forum on the ground that religion constitutes its subject matter, but rather over whether the university had done so. *See* 515 U.S. at 896 (Souter, J., dissenting) ("The Court, of course, reads the Guidelines differently . . . . ").



between religious worship, instruction and indoctrination and speech from a religious perspective is itself constitutionally impermissible. *See* Pet. Br. 24-26. This argument is without merit. Indeed, petitioners' supposed concern is contrary to their own stated position that one cannot draw a subject matter distinction between their speech and that of others. That is, petitioners' entanglement argument presupposes that the school district *can* legitimately distinguish between the subject matter of petitioners' religious speech and the subject matters of other groups' secular speech. Moreover, a broad and categorical exclusion of religious worship, instruction and indoctrination – even when such speech includes a sermon or other expression of religious views on an otherwise includible subject – minimizes the entanglement between church and state, because then the state need not monitor each individual service or lesson plan.

In sum, unlike the school in *Lamb's Chapel* and the university in *Rosenberger*, respondent did not exclude speech on the basis of a religious viewpoint. To the contrary, private individuals and groups were expressly permitted to discuss those subjects otherwise permitted under the school's policy from a religious perspective. *See, e.g.*, J.A. at G6, N14-15. Instead, respondent excluded an entire category of speech from school premises. This limitation was reasonable and was applied without discrimination against any particular viewpoint. Nothing in the Constitution, or in this Court's jurisprudence, forbids that policy.

## II. THE ESTABLISHMENT CLAUSE BARS RESPONDENT FROM ALLOWING PETITIONERS' PROPOSED USE OF PUBLIC SCHOOL FACILITIES

Had the Milford Central School embraced the Good News Club as an after-school program for its elementary school students, it would have violated the Establishment Clause. Stated otherwise, the Establishment Clause stands as an independent bar to petitioners' proposed activities on school premises, regardless of the presence

or absence of valid limitations on the use of the forum under the Free Speech Clause. Indeed, the Milford Central School could have justified its exclusion of the Good News Club's meetings *solely* by reference to the compelling state interest in complying with the Establishment Clause. *See, e.g., Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) ("There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech."); *accord Lamb's Chapel*, 508 U.S. at 394-95; *Widmar*, 454 U.S. at 271.

Whatever else it may mean, the Establishment Clause, "at the very least, prohibits government from *appearing* to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *County of Allegheny*, 492 U.S. at 594 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)) (emphasis added). Allowing impressionable elementary school students to join with petitioners for religious worship, instruction and indoctrination in a school classroom, immediately after school, would violate these prohibitions.

In arguing to the contrary, petitioners emphasize their view that the Good News Club would be meeting on public school premises pursuant to a formally neutral access policy. *See* Pet. Br. 30-39. However, this Court stated only last Term that "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2278 n.21 (2000) (internal quotation marks omitted). In Justice O'Connor's words, "[N]ot all state policies are permissible under the Religion Clauses simply because they are neutral in form." *Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment).

Thus, the crucial question for Establishment Clause purposes is whether, notwithstanding Milford Central



School's formally neutral access policy, a reasonable observer would conclude from the Good News Club's meeting on school premises that the government was "lending its support to the communication of a religious organization's religious message." *County of Allegheny*, 492 U.S. at 601; *see also Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment) ("[W]hen the reasonable observer would view a government practice as endorsing religion, . . . it is our *duty* to hold the practice invalid."). In light of (1) the young age and cognitive limitations of the Good News Club's targeted audience; (2) the fact that the Good News Club's meetings would take place in a classroom setting immediately after school, when many students attend school-sponsored, after-school programs; and (3) the small number of other outside groups meeting on school premises at the same time, *amici* submit that the answer to this question is plainly yes.

### A. A Reasonable Elementary School Student Would Not Understand the Distinction Between Government Speech and Private Speech

First and foremost, the age of the students involved in this case – six to twelve year olds – compels the conclusion that the Milford Central School was required to deny the Good News Club's application to conduct religious worship, instruction and indoctrination on school premises. Indeed, to hold otherwise would represent a marked departure from existing law.

In analyzing whether government action would be perceived as an endorsement of religion, this Court has long placed great emphasis on the age and cognitive maturity of the likely audience. *See, e.g., Lee*, 505 U.S. at 593-94; *Board of Educ. of the Westside Community Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 250-51 (1990) (plurality opinion); *Edwards*, 482 U.S. at 583-84; *Ball*, 473 U.S. at 390; *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring in the judgment); *Marsh v. Chambers*, 463 U.S. 783, 792 (1983);

*Widmar*, 454 U.S. at 274 n.14; *Tilton v. Richardson*, 403 U.S. 672, 685-86 (1971); *Schempp*, 374 U.S. at 252-53 (Brennan, J., concurring). In *Widmar*, for example, the Court explicitly relied on the cognitive maturity of university students in concluding that they would be able to distinguish between private speech and government speech. *See* 454 U.S. at 274 n.14. And in *Mergens*, a plurality of the Court extended the reasoning of *Widmar* to high school students: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis . . . . [T]he few years difference in age between high school and college students [does not] justif[y] departing from *Widmar*." 496 U.S. at 250 (plurality opinion) (internal quotation marks omitted).[12]

The *many* years of difference in age between elementary school students and college students, however, *do* justify departing from *Widmar* in this case. *See, e.g.*, *Edwards*, 482 U.S. at 584 n.5 (acknowledging the distinction between university students and younger students and stating that " '[t]his distinction warrants a difference in constitutional results' " (quoting *Schempp*, 374 U.S. at 252-53 (Brennan, J., concurring)). Research in psychology indicates that six- to twelve-year-old children are substantially less cognitively mature than adolescents, and less likely to understand abstract concepts like justice or diversity. *See, e.g.*, Jean Piaget & Bärbel Inhelder, *The Psychology of the Child passim* (1969); Jean Piaget, *The Stages of the Intellectual Development of the Child, in Readings in Child Development and Personality* 291 (Paul Henry

[12] *Lamb's Chapel*, like *Mergens*, involved a high school. *See Lamb's Chapel v. Center Moriches Union Free School Dist.*, 959 F.2d 381, 383-84 (2d Cir. 1992). Moreover, student age was not an issue in that case because the film series on child rearing was directed toward an adult audience. *See id.* at 384.



Mussen et al. eds., 4th ed. 1997).[13] Similarly, psychological research reveals that elementary school students are highly susceptible to peer pressure. *See, e.g.*, Patricia A. Adler & Peter Adler, *Peer Power: Preadolescent Culture and Identity passim* (1998).

This research supports the common-sense assumption that, in the context of programs held immediately after the "formal" school day on school premises, a reasonable elementary school student would not understand the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality opinion). Instead, the objective observer in the position of an elementary school student at the Milford Central School would mistakenly believe that the Good News Club's meetings were sponsored or endorsed by his or her school.[14] Similarly, an elementary

[13] *See also Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1404 & n.11 (10th Cir. 1985) (discussing expert testimony that "a child between the ages of 6 and 11 does not have the cognitive ability to 'appreciate the difference between his point of view and that of somebody else. It's as if he simply assimilates and takes, unthinkingly, what other people have taught to him' ").

[14] The fact that there is no evidence in the record that students were confused during the time the Good News Club met on school premises pursuant to the District Court's preliminary injunction is immaterial. *See* Pet. Br. 38. As Justice O'Connor explained in *Capitol Square*, the endorsement test does not focus "on the actual perception of individual observers, who naturally have differing degrees of knowledge," but on "the perspective of a hypothetical observer." 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in the judgment).

school student faced with his or her peers attending the Good News Club's meetings would very well feel coerced by peer pressure to attend and to "receive [Jesus Christ] as [his or her] Savior." Lodging at BB24. Those students forbidden to attend by their parents would correspondingly feel excluded, different and diminished within their own school.

These conclusions are further reinforced by the near uniform judgments of courts – including this Court – and of Congress. In the Establishment Clause context alone, courts have routinely taken note of the cognitive limitations of young children. *See, e.g., Edwards*, 482 U.S. at 583-84; *Ball*, 473 U.S. at 390; *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 n.* (4th Cir. 1998); *Good News/Good Sports Club v. School Dist. of Ladue*, 28 F.3d 1501, 1509 & n.18 (8th Cir. 1994); *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1378-79 (9th Cir. 1994); *Bell*, 766 F.2d at 1404-05 & n.11. Courts have noted the same cognitive limitations in other legal contexts as well. *See, e.g.*, 3 Fowler V. Harper, Fleming James, Jr. & Oscar S. Gray, *The Law of Torts* § 16.8 & n.18 (2d ed. 1986) (discussing courts' treatment of children in the tort law context); Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 4.11 (2d ed. 1986) (same in the criminal law context); 5 *Williston on Contracts* ch. 9 (4th ed. 1993) (same in the contract law context).[15]

Similarly, Congress specifically dropped elementary schools from coverage under the Equal Access Act, 20 U.S.C. §§ 4071-4074, in the wake of vociferous objections

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[15] This case law undermines the argument of some *amici* that the "reasonable child" is "a creature unknown to the law." *Amicus Curiae* Brief of Child Evangelism Fellowship, Inc. *et al.* at 9. Indeed, the "reasonable child" is a creature *well* known in tort law. *See, e.g., Restatement (Second) of Torts* § 464, at 507 (1965); *see also Capitol Square*, 515 U.S. at 779-80 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "the applicable observer [for Establishment Clause purposes] is similar to the 'reasonable person' in tort law").



from legislators that elementary school students would be unable to distinguish private speech from school-sponsored speech. *See, e.g.*, S. Rep. No. 98-357, at 43-49 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2348, 2389-94; *see also* 130 Cong. Rec. S19231 (daily ed. June 27, 1984) (statements of Sen. Metzenbaum and Sen. Hatfield); *id.* at H20934 (daily ed. July 25, 1984) (statement of Rep. Schumer); *cf. Mergens*, 496 U.S. at 251 (plurality opinion) (noting that the Court does "not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations"). A failure to recognize a distinction between this case and *Widmar* and *Mergens* would mark a significant retreat from these considered judgments about the cognitive limitations of young children.

Petitioners' assertion that elementary school students' impressionability is a "two way street" is wholly without merit. *See* Pet. Br. 35; *see also* Laycock Br. 26-27. First and foremost, it finds no support in the jurisprudence of this Court. To the contrary, as the cases cited above demonstrate, this Court has long recognized that the "union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice." *Ball*, 473 U.S. at 390. Second, it simply defies common sense to argue that elementary school children would infer from the fact that the Good News Club meets away from school – as the Club once did, in a local church, *see* Pet. App. H2, ¶ 12 – that the Milford Central School is hostile toward religion. To draw this conclusion, a student would have to be aware, *at a minimum*, that the Good News Club sought to meet at the school; that the school did not permit the Good News Club to do so; that this decision was made because the Good News Club is religious; and that the school allows other, nonreligious groups and groups merely with a religious perspective to meet at school. Only a truly *remarkable* elementary school student – not the benchmark *reasonable* student – would be aware of these facts, let alone draw the insupportable inference from

these facts that the Milford Central School is hostile toward religion. Such a remarkable student would no doubt also be aware that the Establishment Clause mandated the school's decision, and thus that any such inference was without foundation.

The age of the students in this case also undermines petitioners' argument that the Milford Central School could counteract any misimpression of endorsement through some sort of disclaimer. *See* Pet. Br. 35-36. To be sure, a plurality of this Court reasoned in *Mergens* that the school board's "fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students." 496 U.S. at 251 (plurality opinion). However, the plurality's reasoning explicitly rested on the assumption that students would "reasonably understand" a statement from the school that its official recognition of the club "evinces neutrality toward, rather than endorsement of, religious speech." *Id.*; *see also Capitol Square*, 515 U.S. at 782 (O'Connor, J., concurring in part and concurring in the judgment) (noting that "the reasonable observer . . . would certainly *be able to read and understand* an adequate disclaimer" (emphasis added)). Where, as here, the audience is incapable even of reasonably understanding such a statement – indeed, where such a statement would likely cause additional confusion among the young children targeted – the "fear of a mistaken inference of endorsement" is not self-imposed, but rather unavoidable.

### B. The Good News Club's Meetings Would Have the Appearance of a School-Sponsored, After-School Program

The probability that a reasonable elementary school student would believe that the Good News Club meetings were sponsored by the Milford Central School would be greatly enhanced by the fact that those meetings would take place in a classroom setting immediately after the end of the formal school day. This factor is particularly salient in today's world because many elementary school students



are effectively, if not actually, required to "attend" school immediately after the "formal" school day. Accordingly, allowing the Good News Club to meet at that time and in that setting would be, for Establishment Clause purposes, tantamount to allowing a religious group to conduct religious worship, instruction and indoctrination *during school hours*.

This Court has long been "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." *Edwards*, 482 U.S. at 583-84; *see id.* at 584-85 (citing cases in which the Court has invalidated statutes "which advance religion in public elementary and secondary schools"); *see also Lee*, 505 U.S. at 592. Public schools hold a unique place among government institutions in Establishment Clause jurisprudence. "Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the student and his or her family. Students in such institutions are impressionable and their attendance is involuntary." *Edwards*, 482 U.S. at 584.

The Court's vigilance has been particularly pronounced with respect to religious activities that take place during the school day because such activities raise two related, but distinct, concerns. First, as a result of mandatory attendance requirements, the emulation of teachers and peer pressure, such activities pose a high "risk of compulsion." *Lee*, 505 U.S. at 596; *see Edwards*, 482 U.S. at 584; *Wallace*, 472 U.S. at 60 n.51; *Schempp*, 374 U.S. at 252-53 (Brennan, J., concurring); *McCollum*, 333 U.S. at 209-10. Second, because such activities blur the line between publicly sponsored school activities and privately sponsored religious activities, they heighten the probability that a reasonable observer in the position of a student will believe that the government is endorsing religion. As the Court explained in *Ball*, "In this environment, the students would be unlikely to discern the crucial difference between the religious school classes and the 'public school'

classes, even if the latter were successfully kept free of religious indoctrination." *Ball*, 473 U.S. at 391.

This case implicates both of these important concerns. The Good News Club proposes to meet in a public school classroom *immediately* after the end of the formal school day, when students remain on school grounds by virtue of the state's "compulsory education machinery." *Lubbock Civil Liberties Union v. Lubbock Indep. Sch. Dist.*, 669 F.2d 1038, 1046 (5th Cir. 1982). Thus, this case is a far cry from *Lamb's Chapel*, in which a religious group sought to use a public school auditorium or gymnasium between the hours of *7 p.m. and 10 p.m.* for the purpose of showing a *film series to adults. See Lamb's Chapel*, 959 F.2d at 384; *see also Lamb's Chapel*, 508 U.S. at 395 (relying in part on the fact that the film series would not have been shown "during school hours" in concluding that the Establishment Clause was not violated). Here, unlike in *Lamb's Chapel*, an objective elementary school student would have felt peer pressure to attend the religious group's meetings – to join his or her classmates as one of the "saved" by receiving Jesus Christ as the Savior, not to mention also wanting to receive candy and prizes – and would reasonably have believed that the meetings were sponsored by the school in which they were held.

To hold that the school day's ending bell alone makes a difference for Establishment Clause purposes would, in today's world, be "formalistic in the extreme." *Lee*, 505 U.S. at 595; *see id.* ("Law reaches past formalism."); *see also Santa Fe*, 120 S. Ct. at 2280. Recent studies reveal that almost 30% of public elementary schools and combined primary-secondary schools now sponsor school-based, extended-day programs. *See, e.g.*, National Center for Education Statistics, *Schools Serving Family Needs: Extended-Day Programs in Public and Private Schools* (U.S. Dep't of Educ. Feb. 1997). *See generally* Patricia S. Seppanen et al., *National Study of Before & After School Programs* (U.S. Dep't of Educ. 1993). Moreover, with the increasing labor force participation of mothers with young children and the increasing numbers of single-parent families, the need for – and,



consequently, the availability of – such programs is only likely to grow. *See, e.g.*, National Center for Education Statistics, *supra*. Since the elementary school students who attend these programs are incapable of leaving the school premises on their own, many public school students are effectively – if not actually – required to "attend" school following the end of the "formal" school day.[16] The Good News Club in all likelihood wants to meet immediately after the final bell sounds in order to include as many of these young students as possible in its evangelical meetings. For these students, the Good News Club meetings in public school classrooms would be no different than religious classes in public school classrooms during (*i.e.*, in the final period of) the "formal" school day. Just as this Court held the latter unconstitutional in 1948, *see McCollum*, 333 U.S. at 209-10, it should leave no doubt that the Good News Club meetings would be unconstitutional today.

### C. The Good News Club Would Be One of Only a Few Private Groups Meeting on Public School Premises

The presence or absence of a broad spectrum of private groups in a government forum is another important factor in measuring a religious group's access to the forum against the principles of the Establishment Clause. Thus, for example, in *Rosenberger*, the religious student newspaper "compete[d] with 15 other magazines and

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[16] In *Mergens*, the plurality found constitutionally significant the Equal Access Act's application only to student meetings during what is clearly "noninstructional time." 496 U.S. at 251 (plurality opinion) (citing 20 U.S.C. § 4071(b)). For high school students, who not only can organize their own meetings but also are always able on their own accord to leave school premises after school, the distinction between "instructional time" and "noninstructional time" is a meaningful one. The same cannot be said for elementary school students.

newspapers for advertising and readership," 515 U.S. at 850 (O'Connor, J., concurring); in *Capitol Square*, the public square was a "space in which a multiplicity of groups, both secular and religious, engage[d] in expressive conduct," 515 U.S. at 782 (O'Connor, J., concurring in part and concurring in the judgment); in *Lamb's Chapel*, the school property at issue was "heavily used by a wide variety of private organizations," 508 U.S. at 392; in *Mergens*, there was a "broad spectrum of officially recognized student ciubs" and "students [were] free to initiate and organize additional student clubs," 496 U.S. at 252 (plurality opinion); and in *Widmar*, "the forum [was] available to a broad class of nonreligious as well as religious speakers" – over 100 recognized student groups in all, 454 U.S. at 274.

In each of these cases, the vibrant nature of the government forum weighed heavily against any appearance of government endorsement. As Justice O'Connor explained in *Rosenberger*, "The widely divergent viewpoints of these many purveyors of opinion, all supported on an equal basis by the University, significantly diminishes the danger that the message of any one publication is perceived as endorsed by the University. . . . Given this wide array of . . . viewpoints . . . , any perception that the University endorses one particular viewpoint would be illogical." 515 U.S. at 850 (O'Connor, J., concurring); *see Mergens*, 496 U.S. at 252 (plurality opinion) ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion."); *Widmar*, 454 U.S. at 274 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect.").

In the present case, by contrast, any perception that respondent endorses one particular group meeting on school premises after school would be not only logical, but well-nigh inescapable. An elementary school is not, like a university or a public square, a forum designed for robust intellectual debate and inquiry. Rather, it is "by . . . nature and historical mandate a protected enclave for the regulated nurture of its students." *Quappe v. Endry*, 772 F. Supp.



1004, 1011 (S.D. Ohio 1991), *aff'd*, 979 F.2d 851 (6th Cir. 1992) (table). Consistent with this, *only three* private groups apart from the Good News Club have met on respondent's premises. *See* Pet. App. E4, ¶ 21; Lodging at Y1-2, Z1, AA3-4.[17] Thus, there is no "broad spectrum" of officially sanctioned private groups meeting at the Milford Central School immediately after the end of the "formal" school day. *Mergens*, 496 U.S. at 252 (plurality opinion). Instead, the Good News Club would be one of only a few such groups, and the danger that its message would be perceived as sponsored or endorsed by the school would be grave indeed.

### D. To Allow the Good News Club to Meet at the Milford Central School Would Constitute an Unprecedented Erosion of Establishment Clause Values

This Court has repeatedly emphasized, in both word and example, that "[e]very government practice must be judged in its unique circumstances" to determine whether it constitutes an endorsement of religion. *Santa Fe*, 120 S. Ct. at 2282 (internal quotation marks omitted); *accord Lee*, 505 U.S. at 597. Only last Term, the Court cautioned that in making such determinations, it is important to "keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded." *Santa Fe*, 120 S. Ct. at 2281 (internal quotation marks omitted). In light of the

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[17] Moreover, it is not clear from the record when these other private groups meet on school grounds – that is, whether they meet immediately after school, as the Good News Club proposes to do, or whether they meet in the evening or on weekends. Thus, it may be that the Good News Club would be the *only* outside group meeting on school grounds immediately after the "formal" school day. *Cf. Mergens*, 496 U.S. at 252 (plurality opinion) ("To the extent that a religious club is merely one *of many* different . . . clubs, students should perceive no message of government endorsement of religion." (emphasis added)).

unique circumstances discussed above, and the fundamental role that public schools play "in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests," *Ambach*, 441 U.S. at 76, allowing the Good News Club to extend the school day for elementary school children by offering religious worship, instruction and indoctrination on public school grounds would result in an unprecedented erosion of Establishment Clause values that would reverberate well beyond this particular case.

## CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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